



State of West Virginia
Office of the Attorney General

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May 1, 2014

Via Certified Mail & Email

The Honorable Gina McCarthy
Administrator
U.S. Environment Protection Agency
1200 Pennsylvania Ave., N.W.
Washington, DC 20460
McCarthy.Gina@EPA.gov

Re: Delay establishing national carbon dioxide emission standards for existing power plants

Dear Administrator McCarthy:

I appreciated the opportunity to speak with your agency's General Counsel, Avi Garbow, at a recent meeting of the National Association of Attorneys General on April 1. At that time, I asked why EPA was moving so quickly to regulate existing power plants when the proposed performance standards for new power plants remain in so much doubt. On April 30, I received a follow-up letter from Mr. Garbow, who emphasized the need for effective communication between state attorneys general and EPA. I write today to reiterate my concerns and to ask again that you consider coming to West Virginia to hear from and speak to those people whose livelihoods will be directly affected by your agency's proposed standards.

As you know, the proposed performance standards for new power plants (the "new source performance standards" or "NSPS") have had numerous well-documented problems already. To begin with, EPA's first attempt at developing the NSPS was withdrawn after the notice-and-comment process revealed numerous serious substantive defects.¹ Then, the now-

¹ 79 Fed. Reg. 1352 (Jan. 8, 2014). See also John M. Broder, *E.P.A. Will Delay Rule Limiting Carbon Emissions at New Power Plants*, N.Y. Times (April 12, 2013), <http://www.nytimes.com/2013/04/13/science/earth/epa-to-delay-emissions-rule-at-new-power-plants.html>.

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pending re-proposed standards² were not published in the *Federal Register* until three months after being publicly released and, even after that delay, were not accompanied by the statutorily-required Notice of Data Availability (“NODA”) and Technical Support Document (“TSD”). The NODA and TSD were not released for another month (nearly halfway through the comment period). Even so, EPA did not extend the comment period until prompted by at least ten States, including West Virginia.³

Moreover, as we will explain in comments soon to be filed together with several other States, the re-proposed NSPS still suffer from many substantive deficiencies. These defects flow in large part from the proposal’s reliance on government-subsidized projects employing carbon capture and storage (“CCS”) and the agency’s inability to identify any coal-fired power plant currently employing CCS on a commercial scale. This is a problem in at least two ways: (1) it violates the Energy Policy Act of 2005, which prohibits the agency from setting a performance standard under section 111 of the Clean Air Act based on technology used at facilities that are awarded certain government subsidies, *see* 42 U.S.C. § 15962(i); and (2) it reveals that CCS is not the “best” “adequately demonstrated” technology within the meaning of section 111 of the Act, *see, e.g., Nat’l Lime Ass’n v. Env’tl. Prot. Agency*, 627 F.2d 416 (D.C. Cir. 1980).

In view of these continuing and obvious problems with the NSPS, we urge you to delay any proposal of performance standards for existing power plants. As EPA has acknowledged, the NSPS are “a necessary predicate for regulation of existing sources.” 79 Fed. Reg. 1430, 1496 (Jan. 8, 2014). Yet—though the comment period for the NSPS does not close until May 9, 2014—we understand that EPA has already shared the proposal for existing sources with the White House Office of Management and Budget for interagency review. At best, the rush forward is a waste of federal tax dollars, as the problems with the NSPS must be resolved before any standards for existing sources can be adopted. At worst, these actions suggest that your agency does not intend to seriously consider any comments on the NSPS and plans to adopt the NSPS—flawed or not—in order to move on to the standards for existing sources. There is simply no good reason to press ahead with a proposal for existing source performance standards while the NSPS remain in progress and in significant doubt.

It has been—and continues to be—my desire that we work together to achieve responsible environmental protection while ensuring the economic livelihood of energy-producing States like West Virginia. To that end, I hope that you will give this request serious consideration and that you will accept my standing invitation to include West Virginia in your travels so that you may hear firsthand from many of the people who will be directly affected by the proposed standards.

² 79 Fed. Reg. 1430 (Jan. 8, 2014).

³ By letter dated February 10, 2014, the Commonwealth of Kentucky formally requested that EPA extend the comment period for 90 days. Likewise, on February 21, 2014, the State of West Virginia and eight other States made the same request.

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Thank you. I look forward to hearing from you soon.

Sincerely,



Patrick Morrissey
Attorney General of West Virginia

cc: Avi Garbow
General Counsel, Environmental Protection Agency